

**STATE OF MINNESOTA
IN COURT OF APPEALS
A25-1443**

State of Minnesota,
Respondent,

vs.

Eddie Lee Harper,
Appellant.

**Filed August 31, 2026
Reversed and remanded
Ross, Judge**

Hennepin County District Court
File No. 27-CR-24-28222

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Nicholas G. Kimball, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Larson, Judge; and Beane, Judge.

SYLLABUS

Domestic assault that results from a defendant's act intending to cause fear under Minnesota Statutes section 609.2242 (2024), and domestic assault arising from a defendant's intentional act inflicting harm under the same statute, are different crimes and not merely different means of committing the same crime, and jurors therefore may find a defendant guilty of either crime only on a unanimous verdict.

OPINION

ROSS, Judge

The prosecutor at Eddie Lee Harper’s trial for felony domestic assault told the jurors that they may find Harper guilty even if they do not unanimously choose between whether he committed the assault by inflicting bodily harm or by intentionally causing fear of imminent bodily harm. Harper objected, asserting that the prosecutor misstated the law, but the district court overruled the objection in the jury’s presence. The jury found Harper guilty. Because the prosecutor misstated the law on jury unanimity and the state has not met its burden to prove that the misstatement was harmless beyond a reasonable doubt, we reverse Harper’s conviction and remand for a new trial.

FACTS

Alleging that Eddie Lee Harper brandished a knife at his fiancée, threatened to “fuck [her] up,” threw her to the ground, and slapped her face, the state charged Harper with a single count of felony domestic assault in violation of Minnesota Statutes section 609.2242, subdivision 4 (2024). We will call his fiancée “Connie,” a name we have randomly chosen in the interest of protecting her privacy.

The state supported these allegations with evidence at Harper’s trial, for which Connie was subpoenaed to testify but did not appear. It introduced a recording of Connie’s 9-1-1 call in which she identified “Eddie Lee Harper” as her attacker. It showed body-camera footage of Connie telling a responding Minneapolis police officer that “Eddie” threw her down in the living room, struck her, and threw her down again in the kitchen, causing her to hit her face on the counter and drawers. Connie reported that, before Harper

threw her down, he showed her one of her kitchen knives and told her, “I’m gonna fuck you up.” The footage includes Connie giving the responding officers Harper’s full name, date of birth, and a picture of him. The state also introduced photographs depicting Connie’s injuries, including swelling under her eye, a broken fingernail, blood under her ear, and a lump above her eyebrow. A paramedic opined that the “swelling and shininess” of Connie’s injuries indicated that they were very likely “fresh.” The state played a recording of Harper’s telephone call to Connie from jail, during which Harper urged Connie not to cooperate with the state’s investigation.

The state also introduced evidence of Connie’s communication with a victim-services specialist. The day after Harper’s call from jail, Connie told the specialist that she had not made the report against Harper, that she wanted the charges dropped, that the incident did not happen, that Harper is a good person, and that she was pregnant with Harper’s child. Connie then emailed the specialist, insisting that she was “NOT a victim” and that Harper was jailed because of a “fake” matter.

The district court’s jury instructions defined the elements of domestic assault and explained that Harper was guilty if the jury found either that he “committed an act with intent to cause [Connie] to fear immediate harm or death” or “intentionally inflicted bodily harm upon [Connie].” And the district court told the jurors that they could find Harper guilty only if they did so unanimously.

The prosecutor elaborated about unanimity in the segment of her closing argument that is at the center of this appeal. She first told the jurors that “there are two ways to prove

domestic assault under Minnesota law.” Then she advised that they did not need to decide unanimously which of the two occurred:

You as a jury don’t have to be unanimous as to which you believe occurred or has been proven beyond a reasonable doubt. As it applies to this case, half of you can believe that the defendant intentionally hit [Connie] and caused her bodily harm. The other half of you can believe that he only intended to cause her fear. Well, that in itself proves the defendant guilty.

You don’t all have to agree to which one occurred. You only have to be unanimous in the fact that one or the other was present and that it was proved beyond a reasonable doubt.

The prosecutor concluded by arguing both theories: domestic assault based on harm and domestic assault based on fear. After the argument and in the jury’s presence, Harper objected to the prosecutor’s comments on jury unanimity as an “improper argument of law.” The district court overruled the objection, also in the jury’s presence.

The jury found Harper guilty of felony domestic assault. And the district court sentenced him to serve 27 months in prison. Harper appeals.

ISSUE

Did the prosecutor’s closing argument constitute reversible misconduct by misstating the law on jury unanimity?

ANALYSIS

Harper argues that the prosecutor committed prejudicial misconduct by misstating the law. Because Harper objected at trial, we review the alleged misconduct using “a two-tiered harmless-error test under which the standard of review varies based on the seriousness of the misconduct.” *State v. Whitson*, 876 N.W.2d 297, 304 (Minn. 2016).

Because the alleged misstatement of law concerns jury unanimity, it involves Harper’s constitutional due-process rights. *State v. Yang*, ___ N.W.3d ___, ___, No. A24-0228, 2026 WL 2104912, at *5 (Minn. July 22, 2026). Because errors implicating constitutional rights are severe, we will apply the more stringent standard of review and order a new trial if we determine that an error occurred and that it was not “harmless beyond a reasonable doubt.” *See State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012); *see also Whitson*, 876 N.W.2d at 304. Under this standard, the burden shifts to the state to prove that the error was harmless. *State v. Conklin*, 444 N.W.2d 268, 275 (Minn. 1989). For the following reasons, we hold that the prosecutor misstated the law on jury unanimity and that the state has not met its burden of proving that the error was harmless beyond a reasonable doubt.

A. The prosecutor’s statement on jury unanimity misstated the law.

Harper contends that the prosecutor misstated the law on jury unanimity. Criminal jury verdicts in Minnesota must be unanimous. Minn. R. Crim. P. 26.01, subd. 1(5); *State v. Pendleton*, 725 N.W.2d 717, 730 (Minn. 2007). This unanimity requirement allows a jury to find a defendant guilty only when “it unanimously finds that the government has proved each element of the offense.” *State v. Ihle*, 640 N.W.2d 910, 918 (Minn. 2002). But the jury “need not always decide unanimously which of several possible means the defendant used to commit the offense in order to conclude that an element has been proved beyond a reasonable doubt.” *Id.* The offense of domestic assault allows for a conviction based on either an intentional act that causes harm or an act intended to cause fear:

Whoever does any of the following against a family or household member . . . commits an assault and is guilty of a misdemeanor: (1) commits an act with intent to cause fear in

another of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm upon another.

Minn. Stat. § 609.2242, subd. 1 (2024). Because Harper had been convicted of two prior qualified domestic-violence-related offenses within the preceding ten years, he was charged with felony-level domestic assault under Minnesota Statutes section 609.2242, subdivision 4, rather than misdemeanor domestic assault. The same statutory language applies. *Id.*, subd. 4. Harper’s contention raises the question of whether assault-harm and assault-fear are *means* to commit domestic assault or whether they are instead separate *offenses* consisting of different elements. This presents a question of law, and we therefore review the issue *de novo*. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016).

The state would have us decide the issue by relying on our decision in *State v. Dalbec*, 789 N.W.2d 508 (Minn. App. 2010), *rev. denied* (Minn. Dec. 22, 2010). We held in *Dalbec* that “assault can be committed in any of three ways,” specifically, assault-fear, assault-harm, or assault-attempt. 789 N.W.2d at 512–13. Under that holding, assault-fear and assault-harm are alternative means of committing domestic assault and would not require jury unanimity as to which of the two the defendant committed. *Id.* at 513. The state is correct that, if our *Dalbec* holding remains good law, the prosecutor here accurately summarized the jury’s duty in her closing argument, and we should affirm.

But the state is incorrect; our *Dalbec* holding has been indirectly overruled by the supreme court. About 16 months after *Dalbec*, the supreme court decided *State v. Fleck*, ruling that assault-harm and assault-fear are separate “crimes” or “offenses” involving different intent elements. 810 N.W.2d 303, 306, 309–10 (Minn. 2012). The *Fleck* court

held that assault-harm is a general-intent crime with a *mens rea* element requiring proof only that a defendant's physical act was voluntary. *Id.* at 309. By contrast, the *Fleck* court held that assault-fear is a specific-intent crime requiring proof of the defendant's specific intent to cause the victim to fear imminent harm. *Id.* That these offenses involve different elements "carries certain legal consequences," one of which is that each distinct element must be proved beyond a reasonable doubt. *Richardson v. United States*, 526 U.S. 813, 817 (1999). *Fleck* nowhere mentions our *Dalbec* decision. But it necessarily follows that assault-fear and assault-harm cannot constitute both alternative means to commit the crime of assault and separate assault crimes consisting of different elements.

We have on several occasions questioned in precedential and nonprecedential opinions whether *Fleck* overruled *Dalbec*, but never under circumstances that required us to decide the answer. *See, e.g., State v. Collins*, 24 N.W.3d 693, 707–08 (Minn. App. 2025), *rev. denied* (Minn. Sept. 17, 2025); *State v. Patzold*, 917 N.W.2d 798, 811–12 (Minn. App. 2018), *rev. denied* (Minn. Nov. 27, 2018); *State v. Evans*, No. A13-2256, 2014 WL 7011130, at *2–3 (Minn. App. Dec. 15, 2014), *rev. granted* (Minn. Feb. 25, 2015) *and ord. granting rev. vacated* (Minn. Aug. 11, 2015). We have observed that *Fleck* "implicitly call[ed] into question" but did not "expressly overrul[e] *Dalbec*'s holding." *Collins*, 24 N.W.3d at 708; *see also State v. Moallin*, No. A14-0329, 2014 WL 7237037, at *6 (Minn. App. Dec. 22, 2014) (Ross, J., dissenting) ("*Fleck* at least undermines our rationale in *Dalbec*, and it may implicitly overrule it."), *rev. granted* (Minn. Feb. 25, 2015) *and ord. granting rev. vacated* (Minn. Aug. 11, 2015). We have recognized that it has remained "an open question" whether assault-harm and assault-fear are alternative means to commit the

same offense or are separate offenses. *State v. Dow*, No. A22-1779, 2023 WL 7119124, at *2 (Minn. App. Oct. 30, 2023), *rev. denied* (Minn. Jan. 16, 2024). Today we answer the question: *Fleck*, and two other supreme court cases decided after our *Dalbéc* decision—*Dorn* and *State v. Oliver*, 28 N.W.3d 445 (Minn. 2025)—inform us that *Dalbéc* no longer controls.

Again, the *Fleck* decision characterized assault-harm and assault-fear not merely as means, but as “crimes” and “offenses.” 810 N.W.2d at 306–08. Then in *Dorn*, the supreme court, citing *Fleck*, stated that assault-harm had “mens rea and actus reus *elements*.” 887 N.W.2d at 831 (emphasis added). Unlike the means the defendant employed, on which a jury need not unanimously agree, whether all elements are proved requires jury unanimity. *Richardson*, 526 U.S. at 817. And finally, in *Oliver*, the supreme court again interpreted assault-harm and assault-attempt as “crimes” and “offenses.” 28 N.W.3d at 453–55. These cases together lead us to conclude that our *Dalbéc* holding has been implicitly overruled.

We acknowledge that the *Fleck* decision interpreted assault-harm and assault-fear under the general definition of “assault” in Minnesota Statutes section 609.02, subdivision 10 (2010), 810 N.W.2d at 308, and that this case instead involves domestic-assault-harm and domestic-assault-fear as defined in Minnesota Statutes section 609.2242, subdivision 1. But it is self-evident that when the legislature made domestic assault a separate category of assault in 1995, it incorporated the extant definition of assault from the general definition. *See* 1995 Minn. Laws ch. 259, art. 3, § 15, at 2783 (codified at Minn. Stat. § 609.2242, subd. 1). Because both definitions use the same material terms to distinguish and define assault-harm and assault-fear, the *Fleck* court’s reasoning applies to domestic

assault in the same way it applies to assault generally. And domestic assault based on an offender's intentional actions causing bodily harm under Minnesota Statutes section 609.2242, subdivision 1(2), is therefore a different crime than domestic assault based on an offender's conduct specifically intended to cause fear under Minnesota Statutes section 609.2242, subdivision 1(1). In sum, we hold that domestic assault that results from a defendant's act intending to cause fear and domestic assault arising from a defendant's intentional act inflicting harm are different crimes and not merely different means of committing the same crime, and that jurors therefore may not find a defendant guilty of either one unless it does so unanimously.

We are not persuaded otherwise by the state's reliance on *Schad v. Arizona*, 501 U.S. 624 (1991). In *Schad*, a plurality of the United States Supreme Court reasoned that states may "define different . . . states of mind . . . as merely alternative means of committing a single offense." 501 U.S. at 632. In its recent decision in *State v. Keyes*, the Minnesota Supreme Court seems to have adopted *Schad*'s unanimity reasoning. ___ N.W.3d ___, ___, No. A23-1400, 2026 WL 2053029, at *7–8, *15 (Minn. July 15, 2026). The *Schad* plurality recognized that it is up to state law to determine whether variations in a defendant's mental state should be framed as merely different means of committing one offense or as elements of different offenses. 501 U.S. at 632. And *Fleck* necessarily implies that the Minnesota legislature did exactly that when it comes to assault-harm and assault-fear. 810 N.W.2d at 309–10. They are different crimes because they involve different mental-state elements. *See id.* at 309; *see also Dorn*, 887 N.W.2d at 831. *Schad* supports our conclusion.

Our holding today that assault-harm and assault-fear are different crimes leads us to conclude that the prosecutor’s closing statements materially misstated the law. And “[p]rosecutors may not materially misstate the law in closing arguments.” *State v. Fravel*, 34 N.W.3d 309, 330 (Minn. 2026). It is axiomatic that “[m]isstatements of the burden of proof are highly improper and would, if demonstrated, constitute prosecutorial misconduct.” *State v. Hunt*, 615 N.W.2d 294, 302 (Minn. 2000). Because assault-fear and assault-harm are separate crimes requiring jury unanimity, the prosecutor misstated the law by advising the jury that it need not unanimously determine which of the two Harper committed. She therefore diluted the state’s burden of proof and committed misconduct. Because we hold that the prosecutor committed an error, the burden shifts to the state to prove that the error was harmless beyond a reasonable doubt.

B. The state did not meet its burden to prove that the error was harmless beyond a reasonable doubt.

The state maintains that it met its burden to prove that the error was harmless beyond a reasonable doubt. The serious, unobjected-to error was not harmless beyond a reasonable doubt unless the guilty verdict was surely unattributable to it. *State v. Bigbear*, 10 N.W.3d 48, 54 (Minn. 2024). To assess whether Harper was prejudiced, we consider factors such as the strength of the evidence, how the error was presented, whether the defense could effectively counter the error, the persuasive value of the error, and whether the error occurred in closing argument. *Id.*; cf. *State v. Courtney*, 696 N.W.2d 73, 80 (Minn. 2005).

On the first factor, we have no difficulty agreeing that the state had a strong case against Harper as to assault-harm. It presented photographic evidence of Connie’s injuries,

testimony from the responding officer and paramedic about the recentness of Connie's injuries, and a 9-1-1 call and body-camera footage in which Connie repeatedly identifies Harper as her assailant. And the state presented the recording of Harper's jail call with Connie, the substance of which would both imply Harper's consciousness of guilt in his urging her not to participate in the investigation and explain Connie's absence from trial.

But contrary to the state's contention that the strength of the evidence has "eliminated any reasonable doubt about the assault-harm theory" and therefore that "[a]ny error in the prosecutor's statement about unanimity was harmless," the strength of the evidence cannot by itself resolve the issue of whether the guilty verdict is surely unattributable to the error. Put differently, the fact that the state's evidence is strong enough to support the guilty verdict does not by itself mitigate a prosecutor's misconduct. *State v. Mayhorn*, 720 N.W.2d 776, 791 (Minn. 2006). This is because "even the strongest evidence of guilt does not eliminate a defendant's right to a fair trial." *Id.* The record demonstrates that the evidence strongly supports Harper's guilt based on his having intentionally caused Connie harm when he threw her down, but it also strongly supports Harper's guilt based on his having intended to cause her to fear when he brandished the knife. We have no way of knowing, and no reason to suppose, that the jurors *unanimously* determined Harper's guilt on either offense especially because of the erroneous argument. The strength of the evidence cannot prove the error harmless beyond a reasonable doubt.

Particularly significant is the manner the error was presented at Harper's trial, given the error's nature. The district court's actual instruction on unanimity was at best ambiguous in the context of the charges. The prosecutor then gave the misleading half-is-

enough elaboration on the district court's instruction. And the district court overruled the objection openly before the jury. This bears sharply on the factor of whether Harper was able to effectively counter the misstatement of law. He was not. Although the "district court is in the best position to attempt to remedy the effects of [any] misconduct," such as by offering curative instructions, *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006), no curative instruction followed the prosecutor's misstatement of law here. The error went to the essence of the jury's decision-making role, misdirecting them from the unanimity requirement that sits at the heart of Harper's right to due process in a Minnesota criminal trial. It misaligned the deliberative fulcrum by misadvising jurors how to come to their verdict. Where, as here, the error "was aimed at having an impact on the verdict, we cannot say that the verdict was surely unattributable to the error." *State v. Litzau*, 650 N.W.2d 177, 184 (Minn. 2002). Intensifying the error's effect, the jurors might have reasonably inferred that the district court endorsed it based on the sequence of events: They heard the judge instruct that a unanimous verdict is required; they heard the prosecutor invite an erroneous application of that instruction; they heard the defense attorney object to the invitation as a misstatement of law; and then they heard the district court overrule that objection. Despite the propriety of the district court's general instruction that the court rather than the lawyers defines the law, this sequence of events related to the misstatement defeats the state's assertion that the misstatement was harmless beyond a reasonable doubt.

DECISION

The prosecutor misstated the law on jury unanimity. The state has failed to prove that the error was harmless beyond a reasonable doubt. We therefore reverse Harper's conviction of felony domestic assault and remand for a new trial.

Reversed and remanded.